

Peretz Bronstein (PB-8628)
Shimon Yiftach (SY-4433)
Bronstein, Gewirtz & Grossman, LLC
60 East 42nd Street, Suite 4600
New York, New York 10165
(212) 697-6484
peretz@bgandg.com
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CHAIM LERMAN, on behalf of himself and others
similarly situated,

Plaintiff

Case No.:

- against -

CLASS ACTION COMPLAINT

APPLE INC.,

JURY TRIAL DEMANDED

Defendant.
-----X

Plaintiff Chaim Lerman ("Plaintiff"), individually and on behalf of the class of all those similarly situated as defined herein, by his undersigned counsel, complaining of the Defendant Apple Inc., alleges as follows:

NATURE OF THE ACTION

1. Plaintiff and the Class bring this action against Apple Inc. for deceptive trade practices and false advertising in violation of New York General Business Law § 349 and § 350. Plaintiff and other owners of the iPhone 4S were harmed when their devices' software was updated to the newest version, iOS 9. The update significantly slowed down their iPhones and interfered with the normal usage of the device, leaving Plaintiff with a difficult choice: use a slow and buggy device that disrupts everyday life or spend hundreds of dollars to buy a new phone. Apple explicitly represented to the public that iOS 9 is compatible with and supports the

iPhone 4S. And Apple failed to warn iPhone 4S owners that the update may or will significantly interfere with the device's performance.

PARTIES

2. Plaintiff Chaim Lerman is a New York resident who lives in Brooklyn, NY.

3. Defendant Apple Inc. is a California corporation with an address at 1 Infinite Loop Cupertino, CA 95014.

JURISDICTION AND VENUE

4. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(d) because at least one member of the putative class is a citizen of a State other than that of the citizenship of Apple, there are more than 100 class members, and the damages suffered and sought to be recovered herein total, in the aggregate, in excess of \$5,000,000, exclusive of interest and costs.

5. At all times material, Defendant has had purposeful and continuous, systematic contacts in or affecting the state of New York.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) because Defendants, at all material times, have had continuous and systematic contacts in this district by actively doing business and perpetuating the deceptive business practices that are the subject of this lawsuit in this district.

FACTS

7. Plaintiff Chaim Lerman owns an iPhone 4s. His iPhone's software was updated to iOS 9 after Apple released iOS 9 to the public.

8. After the update, Plaintiff's iPhone was no longer functional for normal use.

9. After the update, Plaintiff's device slowed down significantly, with delayed responses to touch interactions, application ("App" or "Apps") launches (Apple and third party Apps), and many other problems in all other aspects of the phone's performance. Basically,

Plaintiff's device became slow and buggy, with significant usability problems during everyday use.

10. The update caused performance problems in all aspects of the iPhone's functionality, including core functions like the phone, email, text messages, contacts, etc.

11. Besides slowing down, the update caused crashes and freezes.

12. Upon information and belief, other class members also experienced the same or similar problems with iPhone 4s using iOS 9.

13. Upon information and belief, Apple does not allow iPhone owners to revert their iOS 9 software to a previous, better functioning version of iOS. And Apple does not warn the consumer that the update is irreversible.

14. Plaintiff and other class members were faced with a difficult decision: use a buggy, slow device that disrupts everyday life or spend hundreds of dollars to buy another smartphone.

15. Apple's deceptive practices and misleading advertising caused harm and economic loss to the Plaintiff and the class who lost use of a functional iPhone. Some class members were forced to purchase new smartphones.

16. Plaintiff was subjected to Apple's deceptive practices and misleading advertising that are mentioned below. He was also subjected to many other Apple advertisements not mentioned in this complaint.

17. Upon information and belief, Apple is aware and has been aware for some time that the iPhone 4s's functionality and/or performance is negatively affected by iOS 9. Upon information and belief, Apple was aware of this before iOS 9 was released as a result of internal testing and/or through other means.

18. However, Apple did not and does not warn iPhone 4s owners of this potential problem in their advertising, website, update page of these iPhones, or in any other medium.

19. In fact, Apple only touts the improvements of the new software over the previous version. For example, when advertising iOS online on its website, Apple writes, “What’s new in iOS. iOS 9 is full of enhancements you’ll appreciate every day. Your apps become more essential.... Siri can do more than ever, and new proactive suggestions help you get things done before you ask. And improvements at the foundation of the operating system enhance performance, battery life, and security. The more you do with iOS 9, the more you’ll wonder how you ever did without it.” <http://www.apple.com/ios/whats-new/> (last accessed December 2, 2015)

20. On that same webpage, Apple touts “Faster performance, improved security, convenient updates, and longer battery life.” (emphasis added) Thus, Apple explicitly advertises faster, better performance with its new iOS.

21. As mentioned above, Apple markets to consumers that they should update the software because, amongst other reasons, it has “improved security.” Consumers do not hesitate to have their software updated because a newer version of the software patches security risks found in the previous versions. In other words, not updating means that your phone is vulnerable to security attacks, hacks, and other internet/software dangers in this digital age.

22. Along the same lines, elsewhere Apple advertises, “Engineered to perform. At every level. Under-the-hood refinements bring you more responsive performance, easier updates, better battery life, and tighter security. So your device works that much better — for everything you do with it. <http://www.apple.com/ios/whats-new/#foundation> (last accessed December 2, 2015).

23. On that same page, Apple advertises, “Faster and more responsive. The apps in iOS 9 now take advantage of Metal, making more efficient use of the CPU and GPU to deliver faster scrolling, smoother animation, and better overall performance. Email, messages, web pages, and PDFs render faster.”

24. And Apple promises more security improvements in iOS 9 on that same page: “Improved security. Keeping your devices and Apple ID secure is essential to protecting your personal information — like photos, documents, messages, email, and so much more. iOS 9 advances security by strengthening the passcode that protects your devices, and by making it harder for others to get unauthorized access to your Apple ID account. These new security features are easy for you to use. But they make it much harder for anyone else to access your personal information.”

25. Similarly, in other marketing material on their website, Apple state, “And because iOS 9 is engineered to take full advantage of the advanced technologies built into Apple hardware, your devices are always years ahead.” <http://www.apple.com/ios/what-is/> (last accessed December 2, 2015). There, Apple also tells consumers the iPhone and iOS are **“Hardware and software made for each other. Because Apple makes both the hardware and the operating system for.... iPhone, everything is designed to work together.”** (emphasis added)

26. On that same page, Apple encourages consumers to update their iPhone whenever a new update comes out: “Easy to update. iOS updates are free. And they’re available to download wirelessly on your iPhone...the moment they’re released. Your device even alerts you when it’s time to get the latest version. So you won’t miss out on all the amazing features in new updates.”

27. On another webpage, Apple advertises: “Update the iOS software on your iPhone... Learn how to update your iOS device wirelessly or using iTunes. **iOS updates introduce new features that let you do even more with your iPhone.... Be sure to keep your devices updated so that you don't miss out on the latest features.**”

<https://support.apple.com/en-us/HT204204> (emphasis added)

28. On that same page, Apple explains, “Update your device wirelessly. If a message says that an update is available, tap Install Now.” iPhones provide popup and other types of notifications advising consumers to update.

29. On the software update page in the iPhone, Apple did and does advise consumers that their iPhones will improve drastically through a prominent and conspicuous explanation of performance upgrades and new features. Apple fails to warn iPhone 4s owners, here or anywhere else in their advertising or updating process, that iOS 9 will significantly downgrade performance on their devices.

30. Apple explicitly advertises and advises consumers that the iPhone 4s is compatible with iOS 9. <https://www.apple.com/ios/whats-new/#compatibility> (last accessed December 2, 2015)

31. Apple also encourages updates through promises of improved Apps, new functionality, better performance, and improved security.

32. Upon information and belief, Apple has touted high adoption rates of iOS 9 on its website, press releases, and in its famous keynote addresses (video streams and live events) for its new products and software. For example, Apple’s Press Release of September 21, 2015 (weeks before the iPhone 6S, the newest iPhone, was released) proudly proclaimed, “Apple also announced the fastest iOS adoption ever, with more than 50 percent of devices already using iOS

9.” <http://www.apple.com/pr/library/2015/09/21iPhone-6s-iPhone-6s-Plus-Arrive-on-Friday-September-25.html> (last accessed December 2, 2015).

33. Moreover, Apple explicitly uses the promise of future updates for years as a selling point that induces new iPhone purchases. On the iPhone’s homepage (<http://www.apple.com/iphone/> last accessed December 2, 2015), there’s a hyperlink under the heading “Why iPhone.” When clicking on that link, the consumer is transferred to another webpage (titled: “Why there’s nothing quite like iPhone) where Apple promises the consumer, **“And whenever there are shiny, new software updates with shiny, new features, you should be able to sit back, relax, and know your phone will get them. And be compatible with them. For years. For free.”** <http://www.apple.com/iphone/why-theres-iphone/> last accessed December 3, 2015 (emphasis added).

34. Apple clearly wants and encourages everyone to update to the latest iOS version because it helps its image, marketing position, ability to sell new devices, and bottom line.

35. iPhone owners buy Apps from Apple and third parties in Apple’s official App Store. Upon information and belief, each App purchase benefits Apple through a commission or fee (for third party Apps) or the complete purchase price (for an Apple App).

36. Some Apps are essential to some iPhone users because they’ve integrated them into everyday life or business or because they provide important functionality they may not find elsewhere, or that they could find on another smartphone only with new app purchases.

37. The same is true with music, movies, and other media and services/products purchased through Apple or iPhone, which are compatible and available only on the iPhone or other Apple products. Upon information and belief, such media and other services/products purchased cannot be accessed through other smartphones.

38. When iPhone 4s owners are faced with the dilemma of continuing to use a slow, buggy phone or spend hundreds to buy a new phone, Apple often benefits because consumers will often buy a new iPhone to keep their investment in the App ecosystem. If they buy any other smartphone, they lose the use of all the Apps they purchased and must buy other Apps on the competitor smartphone, incurring a double loss (loss of Apps and payment for new Apps). Upon information and belief, a large number of iPhone 4s owners purchase newer versions of the iPhone for this reason, enriching Apple in the process.

39. Furthermore, iPhone owners will buy a newer iPhone when faced with the choice because it is familiar and they can easily transfer their information, media, contacts, and apps without a major disruption in usage. There is no learning curve and no delays and trouble that accompany new information input. Thus Apple stands to benefit financially when older iPhones are slowed down and owners are forced to purchase a new phone.

40. To complicate matters, many customers must commit to a new 2-year agreement (or other long-term agreement) with Apple and/or wireless carriers such as Verizon, Sprint, T-Mobile, AT&T, or other carriers in order to purchase the new phone.

41. This agreement or process is often done with Apple itself, over the phone or through a physical store, where Apple sets up service with the carrier. Consumers thus face more purchases and obligations as a result of iOS 9 on their devices. Upon information and belief, Apple benefits financially when setting up such new service contracts; further investigation is required on this matter.

42. As a result of Apple's above-mentioned deceptive practices and false advertising, Plaintiff and other class members were harmed by losing normal use of their iPhone 4s's and

being forced to purchase a new smartphone as the only alternative to living with a slow, buggy, and disruptive device.

43. Apple's statements and advertisements were materially misleading because while it encouraged upgrading to iOS 9, Apple failed to warn iPhone 4s owners of possible performance degradation.

44. It is impossible for consumers to miss Apple's widespread, ubiquitous advertising net. The advertisements are in New York and the rest of the country, through seemingly every medium possible, including billboards, magazines, and the Internet. The advertisements and statements included in this complaint are only samples: discovery will reveal more relevant statements and advertisements.

45. The Plaintiff and class members were all subjected to the same false, misleading and deceptive practices and advertising as Apple designed and promoted iOS 9 for the iPhone to be marketed and distributed in a uniform fashion in New York and to be adopted by iPhone 4s owners.

46. Plaintiff and the rest of the class relied on Apple's misleading statements and/or advertisements in updating to iOS 9 with the fair and reasonable expectation of receiving equal or better performance and/or new features and functionality.

47. At all relevant times, Apple knew its statements and advertisements to be materially misleading. Their statements and advertisements were negligent, reckless, and/or intentional.

48. Apple omitted a warning or disclaimer to iPhone 4s owners to the effect that iOS 9 may or will degrade overall performance and usability.

49. The Plaintiff and class members suffered the same or similar harm as a direct result of Apple's material misrepresentations and concealment of true material facts, leading the consumer to download and install a product that was hailed as offering a substantial upgrade, enhanced reliability, enhanced features, and greater functionality and capability, when in fact such was completely false.

50. Upon information and belief, all of the above allegations are similarly true with respect to Apple's advertising and statements with respect to iOS 8 and its negative effect on the performance of the iPhone 4s.

CLASS ACTION ALLEGATIONS

51. This action is brought on behalf of named Plaintiff and as a Class Action pursuant to Rules 23(b)(1),(2), (3) and 23(c) of the Federal Rules of Civil Procedure on behalf of the following proposed "Class" or "Class Members":

Class: All individuals, businesses, and entities in New York who own an iPhone 4s and have updated their iPhones to iOS 9 (or later versions of iOS 9).

52. Numerosity: The members of the Class are so numerous and geographically diverse that joinder of all of them is impracticable. While the exact number and identities of members of the Class are unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff believes and avers that there are at least thousands of class members.

53. Commonality: Plaintiff and Class Members' claims derive from a common core of salient facts and share many of the same legal claims. There are questions of fact or law common to members of the Class which predominate over any questions affecting any individual members, including, but not limited to, the following:

a. Whether it was an unfair or deceptive business practice in violation of consumer

protection laws when Apple made various statements and advertisements to iPhone 4s owners regarding iOS 9 (some of said statements and advertisements appearing in this complaint);

b. Whether it was deceptive advertising in violation of consumer protection laws when Apple made various statements and advertisements to iPhone 4s owners regarding iOS 9 (some of said statements and advertisements appearing in this complaint);

c. Whether it was an unfair or deceptive business practice in violation of consumer protection laws when Apple omitted facts and/or disclaimers to owners of iPhone 4s regarding the adverse effect of iOS 9 on the performance of the iPhone 4s;

d. Whether it was deceptive advertising in violation of consumer protection laws when Apple omitted facts and/or disclaimers to owners of iPhone 4s regarding the adverse effect of iOS 9 on the performance of the iPhone 4s; and

e. Whether it was an unfair or deceptive business practice in violation of consumer protection laws when Apple made iOS 9 available for download to iPhone 4s owners;

54. Typicality: Plaintiff's claims are typical of the claims of other members of the Class in that Plaintiff's claims arise from the same course of deceptive conduct by Apple that affects Class Members. Plaintiff, like other Class Members, was harmed by Apple's statements, advertisements, and the degraded functionality of his device. Plaintiff, like other Class

Members, was harmed by Apple's failure to warn iPhone 4s owners that iOS 9 may or will significantly and negatively affect the functionality and performance of his device.

55. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff claims are coextensive with, and not antagonistic to, the claims of other Class Members. Plaintiff is willing and able to vigorously prosecute this action on behalf of the Class. Plaintiff's attorneys are competent and experienced in the area of representative and class actions.

56. Plaintiff brings this action under Rule 23(b)(3) because common questions of law and fact predominate over issues that are individual to members of the Class. The proposed Class is sufficiently cohesive to warrant class and representative treatment. Upon information and belief, Defendants have the technology and records that would permit Plaintiff a plausible class-wide method for proving the case. Certification under Rule 23(b)(3) is also appropriate because a class action is superior to other available methods for the fair and efficient adjudication of this action. The expense of litigating each Class Member's claim individually would be so cost prohibitive as to deny Class Members a viable remedy. Plaintiff envisions no unusual difficulty in the management of this action as a class action.

57. Plaintiff also brings this action under Rule 23(b)(2) because Defendant has acted or refused to act on grounds generally applicable to all members of the Class, thereby making final injunctive relief concerning the Class as a whole appropriate. In the absence of appropriate injunctive relief, Defendant will continue its unfair and deceptive practices. Defendant's uniform conduct towards Plaintiff and the other members of the Class makes certification under Rule 23(b)(2) appropriate.

FIRST CAUSE OF ACTION
(Violation of New York General Business Law § 349)

58. Plaintiff repeats and realleges the foregoing allegations.

59. Apple's conduct was consumer oriented because Apple falsely advertised and made materially misleading statements to consumers throughout New York regarding the performance of its products and software.

60. By reason of the foregoing and as a result of Apple's conduct, Plaintiff and the Class have been harmed economically and by losing use of a functional iPhone. They are entitled to recover damages and attorney's fees pursuant to NY GBL § 349.

SECOND CAUSE OF ACTION
(Violation of New York General Business Law §350)

61. Plaintiff repeats and realleges the foregoing allegations.

62. Apple's advertisements were false and materially misleading in a material way, via affirmative statements and omissions (Apple failed to reveal facts material in light of such representations).

63. By reason of the foregoing and as a result of Apple's conduct, Plaintiff and the Class are entitled to recover damages and attorney's fees pursuant to NY GBL § 350.

WHEREFORE, Plaintiff and the Class demand judgment against Apple Inc. on the First and Second causes of action with:

- An award of damages, trebled, or the maximum amount otherwise allowed under the two causes of action, whichever is greater;
- An order enjoining Apple's unlawful practices and requiring corrected advertisements and disclaimers; and
- An award of attorney's fees.

Dated: December 29, 2015

BRONSTEIN, GEWIRTZ
& GROSSMAN, LLC

By:

/s/ Peretz Bronstein

Peretz Bronstein (PB-8628)

Shimon Yiftach (SY-4433)

60 East 42nd Street, Suite 4600

New York, New York 10165

(212) 697-6484

peretz@bgandg.com

Attorneys for Plaintiff